



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Ben J. Dean
District Attorney
Breckenridge, Texas

Dear Mr. Dean:

Opinion No. 0-2906

Re: Whether or not the successor to a defaulting Tax Assessor -- Collector may lawfully pay out of fees earned by such successor that part of the salaries of the deputies which was incurred, but not paid, during the administration of his predecessor, and further whether or not the defaulting Assessor-Collector and his bondsmen are liable for such unpaid portion of salaries due to deputies?

We beg to acknowledge receipt of your letter of November 5, 1940, requesting an opinion from this department, which letter is as follows, to-wit:

"The Stephens County Tax Assessor and Collector is a fee officer in a county under twenty thousand population. He resigned from his office on April 25, 1940. At the time of his resignation he was short in his accounts, and was short in his fee account for the year 1940, \$1207.69. He had paid the salaries of his deputies up until April 15, but during the period of April 15, 1940, to April 25, 1940, the date said Tax Assessor and Collector resigned, the deputies have not been paid. Inasmuch as the collector had collected fees in excess of an amount necessary to pay the deputies and had failed to pay them, the County takes the position that this is a debt of the collector and not of the County; whereas, the

deputies involved take the position that the successor to the tax assessor and collector should pay the balance due on these salaries out of the fees earned subsequent to April 25, 1940, and during the year 1940, there being on hand sufficient fees for this purpose.

*The Tax Assessor and Collector, after he resigned, made his final report, but did not settle with the County, and has never settled with the County, and suit is now pending against said Tax Assessor and Collector and his bondsmen for the excess fees of office during 1940 retained by said Tax Assessor and Collector. The bond by the Tax Assessor and Collector is in statutory form.

*Article 3897 provides for the filing of an annual report showing all fees and commissions earned by the tax assessor and collector.

*Article 3898 defines the fiscal year as beginning on January 1st of each year, and provides that where an official serves a fractional part of such a year he shall nevertheless make final settlement for the portion so served and shall be entitled to the proportionate part of his compensation.

*Article 3891 provides, with reference to the disposition of the fees of office, that the tax assessor and collector shall, 'out of the current fees of his office pay or be paid the amount allowed him under the provisions of Article 3883, together with the salaries of his assistants and deputies.'

*Article 3899 provides among other things with reference to the tax assessor and collector that, 'the amount of such expenses, together with the amount of salaries paid to assistants, deputies and clerks shall be paid out of the fees earned by such officer.'

"It appears from the foregoing that the Tax Assessor and Collector of Stephens County is re-

quired to pay his clerks and deputies out of the fees earned by him and that there are no fees earned by him with which to pay the same.

"I should like to propound the following two questions:

"FIRST: Can the successor to the defaulting tax assessor and collector lawfully, out of fees earned by such successor, pay that part of the salaries of the deputies which was incurred and unpaid during the administration of his predecessor in office?

"SECOND: Are the defaulting tax assessor and collector and his bondsmen liable for the unpaid amount of salaries due the assessor and collector's deputies at the time of his resignation?"

Your first question should be answered in the affirmative, for the following reasons:

While deputy Assessors-Collectors are named or appointed by the Assessor-Collector, nevertheless, such deputies are officers themselves of the county under the State, whose compensation is paid out of fees earned by the Assessor-Collector's office. Article 3891, Rev. Civ. Stat. of Tex. The status of such a deputy is not different from what it would be if his appointment were made directly by the Commissioners' Court of the county rather than by the Assessor-Collector.

It is made the duty of such officer employing a deputy to pay such deputy out of the current fees of office the amount to which he is entitled under the provisions of the applicable statutes. Rev. Civ. Stat., Art. 3891. It is further provided in the Article just cited "If the current fees of such office collected in any year be more than the amount needed to pay the amounts above specified, same shall be deemed excess fees, and shall be disposed of in the manner hereinafter provided."

The obvious purpose of the Legislature was to provide a method for paying such deputies, and further to provide that such deputy or deputies were entitled to look for payment to the fees of office collected by their superior during the fiscal year. This, we think, is a clear implication of the statute.

Whether the deputy's salary is paid monthly as it accrues, or is deferred until the end of the fiscal year, nevertheless, if there are fees of office from which payment can be made, his claim is a just one against such fees, and should be recognized and paid therefrom.

Incumbents of an office may come and go, but the office functions so long as there is an incumbent.

There is no reason why the deputies' salaries should not be paid for their services duly performed out of fees of office which you say are on hand, merely because such fees have been collected by the successor in office to one who employed such deputy.

These conclusions find support in our Opinion No. 0-2745 and in *American Ind. Co. vs. Red River Nat'l Bank*, 132 S. W. (2) 473, where it is said:

* * * . Excess fees of a tax collector consist of the sum remaining in his hand after deducting from the total of all lawful fees collected by him during the year the following items: (1) His 'maximum annual fees' as provided by Articles 3383 and 3383a; (2) and his deputy hire as provided by Article 3391; and (3) his office expenses as provided by Article 3399; and (4) 1/4 of the remainder until such 1/4 amounts to the sums specified in Article 3391 dependent upon the population of the county. What portion, if any, of the fees lawfully retained by the tax collector according to his monthly reports may become excess fees can not be ascertained until the end of the fiscal year. * * *

Your second question likewise should be answered in the affirmative, because, clearly, the defaulting officer to the extent that he had funds in his possession available should have paid such funds to the deputy or deputies. In other words, a faithful discharge of his duties required

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him to do that very thing, for which reason the Assessor-Collector and his bondsmen are liable for the defalcation.

The case of Maryland Casualty Co. v. State, 81 S. W. (2) 165, 107 S. W. (2) 865, supports the views we have expressed.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By

Ocie Spear
Ocie Spear
Assistant

OS-MR

APPROVED FEB 14, 1941

Gertrude Mann

ATTORNEY GENERAL OF TEXAS

